

(2011) 11 AHC CK 0086

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1948 of 1976

Vishwanath

APPELLANT

Vs

Deputy Director of Consolidation and others

RESPONDENT

Date of Decision : 04-11-2011

Acts Referred:

Transfer of Property Act, 1882 — Section 55(1)

Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 48, 9A(2)

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 134, 135, 136, 137

Citation : (2011) 11 ADJ 804 : (2012) 115 RD 26

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Prakash Krishna, J.—Questioning the legality, validity and propriety of the order dated 11th June, 1976 passed by the Deputy Director of Consolidation in Revision No. 1734, Vishwanath and others v. Vishwanath whereby he has set aside the order of the First Appellate Court, namely, Settlement Officer, Consolidation dated 7th November, 1975 and restored the order dated 21st February, 1974 that of Consolidation Officer, the present writ petition has been filed.

2. The dispute relates to two Khata Nos. 10 and 11 situate in village Pura Raiji, Pargana Sultanpur, District Varanasi. In the basic year khata no. 11 was recorded in the names of Badri and Thakur Prasad as bhumidhars. Khata No. 10 was recorded in the names of Shyam Narain, Purshottam and Badri. The petitioner, namely, Vishwanath S/o Ram Sumer claimed 1/4 share in the aforesaid two khatas through his objection filed u/s 9-A(2) of the U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "the Act") on the ground that khatas in dispute are ancestral and his name is wrongly not recorded over them. Respondents no. 3 to 7 filed two sets of written statement, contesting the claim of the petitioner. They are purchasers by means of four sale-deeds dated 27th

July, 1958 in respect of khata no. 11 and 17th October, 1959, 3rd June, 1957 and 30th March, 1955 in respect of khata no. 10 from the then recorded tenure holders. It was contended by them that they are bonafide purchasers for value without notice. Their names were mutated after sale-deeds but the petitioner did not raise any objection then and there. They are in occupation of the disputed land in pursuance of the aforesaid sale-deeds and even otherwise have perfected their title by remaining in possession since the date of sale. In the another set of written statement, it was pleaded that there was a partition in the family long ago and in the said partition the petitioner's branch was given land of village Paharpur and the disputed lands were allotted to the branch of the present recorded tenure holders/respondents.

3. The parties led their evidence oral and documentary in support of their respective cases.

4. Consolidation Officer found that the petitioner could not dare to come in the witness-box to deny the theory of partition. He could examined his son Virendra Pratap, who was aged 27 years and had no knowledge about partition. It was found that the sale-deed dated 27th July, 1958 in respect of khata no. 11, no objection was preferred by the petitioner in mutation proceedings. The possession of vendee was also found in view of various irrigation slips and other documents produced by him. Similarly, in respect of khata no. 10, possession of Ram Karan, the purchaser was found who purchased the land by means of three sale-deeds dated 30th March, 1955, 3rd June, 1957 and 17th October, 1959. The petitioner/objector could not produce any evidence to prove that he is in possession over the disputed lands. It was also noticed that since the agricultural year 1334F (which corresponds to year 1927), the name of Ram Sumer (father of the petitioner) is not recorded in the revenue record. Consequently, he dismissed the objection of the petitioner and maintained the basic year entries by the order dated 21st February, 1974. The matter was carried in Appeal No. 909 before the Settlement Officer, Consolidation (the S.O.C.), which was allowed by the order dated 7th November, 1975. The S.O.C. found that the land in dispute is ancestral property and name of Ram Sumer, father of the petitioner was found recorded in 1307F (which corresponds to year 1900). He has also noticed that there has been a partition in the family but found that the theory that the entire land at Paharpur was given to the petitioner's branch appears to be wrong. He ordered for separation/partition of 1/8 share of the present petitioner. The matter was carried further in revision by Vishwanath (he is another person being son of Ram Das) and others, which has been allowed by the impugned order.

5. Deputy Director of Consolidation has held that the respondents herein purchased the disputed property by means of sale-deeds executed during the period 1955 to 1959, their names were recorded. The village came under consolidation operation in the year 1973 and respondents herein were in occupation of the disputed land for a period more than 12 years, have perfected

their title by adverse possession.

6. Heard Shri Ram Niwas Singh, learned counsel for the petitioner. None appeared on behalf of the contesting respondents.

7. The matter was listed on various dates but respondents' counsel who has filed counter affidavit choose not to appear at the time of hearing of writ petition.

8. Learned counsel for the petitioner urged the following two points for consideration.

? Deputy Director of Consolidation had exceeded in his jurisdiction in reversing the finding of fact recorded by the S.O.C. He had limited jurisdiction under unamended provisions of Section 48 of the Act.

? Possession of one co-sharer is on behalf of all the co-sharers and as such a co-sharer cannot claim title by adverse possession against other co-sharers.

9. Taking into consideration the first point first, the submission is that in view of the fact that the order of Deputy Director of Consolidation is dated 11th June, 1976, the case shall be governed by Section 48 as it then stood. It may be noted that by U.P. Act No. 3 of 2002, Explanation (3) was added with effect from 10th November, 1980. The said Explanation provides that power u/s 48 of the Act to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to re-appreciate any oral or documentary evidence. Elaborating the argument, it was submitted that for the period anterior to 10th November, 1980, Deputy Director of Consolidation had no such power to examine any finding recorded by subordinate court on the question of fact or to re-appreciate any oral or documentary evidence.

10. Reliance has been placed upon Apex Court decision in Gaya Din (Dead) through L.Rs. and others versus Hanuman Prasad (Dead) through L.Rs. and others, 2001 (92) R.D. 79. In the aforesaid case, the Apex Court has noticed its earlier pronouncements in Ram Dular v. Deputy Director of Consolidation, Jaunpur and others, 1994 RD 290, Seshmani and another v. Deputy Director of Consolidation, District Basti, U.P. and others, 2000 RD 210 and Sheo Nand and others v. Deputy Director of Consolidation, Allahabad and others, 2000 RD 213.

11. A fair reading of these judgments would show that the power of Deputy Director of Consolidation after U.P. Act No. 3 of 2002 has been widened but at the same time, it is no so wide to equate it with the power of court of appeal. An extract from the judgment of Ram Dular (supra) has been produced in the judgment of Seshmani (supra) which is reproduced herein, for the sake of convenience:

It is clear that the Director had power to satisfy himself as to the legality of the proceedings or as to the correctness of the proceedings or correctness, legality or propriety of any order other than interlocutory order passed by the authorities

under the Act. But in considering the correctness, legality or propriety of the order or correctness of the proceedings or regularity thereof it cannot assume to itself the jurisdiction of the original authority as a fact-finding authority by appreciating for itself of those facts *de novo*. It has to consider whether the legally admissible evidence had not been considered by the authorities in recording a finding of fact or law or the conclusion reached by it is based on no evidence, any patent illegality or impropriety has been committed or there was any procedural irregularity, which goes to the root of the matter, had been committed in recording the order or finding.

12. In *Sheo Nand and others v. Deputy Director of Consolidation, Allahabad and others*, 2000 RD 213, it was held as follows:

Section 48 of the Consolidation Act gives very wide powers to the Deputy Director. It enables him either *suo moto* on his own motion or on the application of any person to consider the propriety, legality, regularity and correctness of all the proceedings held under the Act and to pass appropriate orders. These powers have been conferred on the Deputy Director in the widest terms so that the claim of the parties under the Act may be effectively adjudicated upon and determined so as to confer finality to the rights of the parties and the Revenue records may be prepared accordingly.

13. In the aforesaid decision, Explanation (3) was not up for consideration and case was decided as Section 48 stood prior to insertion of Explanation (3). The aforesaid passage has been reproduced in the case of *Gaya Din (supra)*. The portion underlined defines the length and width of power of Deputy Director of Consolidation as it then existed prior to U.P. Amendment Act No. 3 of 2002.

14. Now I may revert to the fact of the case to find out whether the findings of the S.O.C. are perverse in the sense that they are not supported by the evidence brought on record by the parties or they are against weight of evidence. The question before the consolidation courts was whether as a result of partition (partition has been accepted), the petitioner's branch has any right, title or interest in the disputed land. Consolidation Officer has noticed that in the *khatauni* of 1307F names of Mahipal, Bindeshri and Ram Sumer (father of the petitioner) were recorded. After 1307F the name of the petitioner's father is not recorded in any revenue record indisputably. Long standing revenue entries have their own value and sanctity. Since 1334F onwards, the names of Badri Narain and Harpal alone were recorded. In 1359, the name of Badri Narain is recorded. To put it differently the name of Ram Sumer (father of the petitioner) is not recorded since then, and he took no objection at any point of time.

15. The case of the contesting respondents was that there has been a partition in the family with the result Ram Sumer (father of the petitioner) was separated. The theory of said partition, has been found to be correct, even by the S.O.C., who had allowed the appeal. But without any discussion by making a passing remark that it does not appear that the land at Paharpur was exclusively given to

the branch of petitioner's father he jumped to the conclusion that the petitioner has share in the disputed property. This conclusion is wrong as the petitioner came out with the case of joint family which has not been found to be correct, even by the S.O.C.

16. The theory of partition is supported by the attending facts and circumstances of the case. Non recording of the name of petitioner's father after the year 1307F supports the theory of partition to the effect that he was separated. Had there being no partition, Ram Sumer should have taken steps for recording of his name in the revenue record, if his name without any valid reason, was not recorded after 1307F. There is no evidence that any effort was made by Ram Sumer for getting his name recorded in the revenue record after 1307 F. It is indicative of the fact that he had lost his share in the disputed property as a result of partition in the family.

17. Second aspect of the case is that the S.O.C. while reversing the judgment of the Consolidation Officer has totally ignored the fact that the petitioner failed to appear in the witness box to avoid his cross-examination. Instead, he produced his son of young age who is not supposed to have any knowledge about partition. This is one of strong circumstances which was taken against the petitioner but has been ignored by the S.O.C.

18. Third aspect of the case, as it has been found the petitioner has not produced even a single piece of evidence to show his possession over the disputed land for the last more than 50 years. It is not his case that he had no knowledge about various sale-deeds executed by other members of the family in favour of the contesting respondents ranging the period 1955 to 1959 year.

19. No objection was raised even at the time of mutation proceedings with regard to the mutation of the names of vendees.

20. By ignoring all the material circumstances, available on record, the S.O.C. on the basis of presumptions and assumptions had rejected the plea that the entire land at Paharpur was not allotted to the branch of the petitioner in partition. Obviously, the conclusion reached at by the S.O.C. is perverse and against the weight of evidence on record. To put it differently, the order of the S.O.C. is not legally supportable. It is based on ignorance of material facts and circumstances of the case and therefore, it is an improper order. Deputy Director of Consolidation rightly exercised his power. u/s 48 of the Act, the order of the S.O.C. falls within ambit and scope of "correctness", "legality" or "propriety" of the order.

21. Viewed as above, the argument of the learned counsel for the petitioner that Deputy Director of Consolidation has exceeded in his jurisdiction while passing the impugned order, has no merit and is therefore, rejected.

22. Now, I take-up second and last point raised by the petitioner with regard to his co-tenancy in the disputed khatas. The sole contention of the petitioner in

this regard is that even if, the name of petitioner or of his father was not recorded in the revenue record, it will not make any difference as the petitioner is a co-sharer and the property in dispute is ancestral property.

23. Reliance has been placed upon *Karbalai Begum Vs. Mohd. Sayeed and Another*, AIR 1990 SC 553 , *Om Prakash and Others Vs. Bhagwan and Others*, and *Shailendra Amar Singh V. Harnam Singh Cornaiius*, 1997 All CJ 414.

24. Elaborating the argument, it was submitted that in view of decision of the Apex Court in *Karbalai Begum (supra)* mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to other co-sharer in possession. The decisions relied upon by the petitioner are distinguishable on facts and have no application to the case in hand. These decisions and the argument of the petitioner proceeded on the footing that the possession of one co-sharer is on behalf of all other co-sharers and as such a co-sharer cannot claim title by adverse possession against other co-sharers. The above principle of law is not applicable to the facts of the present case.

25. It may be placed on record that no attempt was made by the learned counsel for the petitioner to challenge the finding with regard to partition in family. The said finding is thus, final and binding on the parties. The petitioner's father was a co-sharer at one point of time around year 1900 and the subsequent partition in the family is also an accomplished fact. This cuts the very root of the petitioner's stand. The petitioner could not produce any evidence to show his possession over any piece of land. He has also not disputed the legality and validity or want of knowledge about the four sale-deeds referred to above which were executed more than 12 years ago prior to commencement of the consolidation operation in the village. The names of the vendees have been recorded without any whisper by the petitioner. In any case, the execution of sale-deeds without there being any protest by the petitioner for a period more than 12 years proves the ouster of the petitioner from the land in question, even if he had some semblance of title.

26. I could lay my hands to a recent decision of the Apex Court in the case of *Ram Avadh and Others Vs. Ram Das and Others*, in particular.

27. The Apex Court has held that where a person purchases a property from the recorded tenure holder and no step was taken by the person who claims his title over the disputed land but his name is not recorded for the inclusion of his name in the revenue record, the purchaser would be bonafide purchaser for value when the purchaser had made due inquiry u/s 55(1)(b) of the Transfer of Property Act that vendors were recorded bhumidhars of the suit property and had a transferable right. The relevant paragraph-15 is reproduced below:

There is another aspect of this matter. In the present case, even if it is found that the names of Faqir and subsequently Bhagirati andors. Were fictitiously recorded, the fact remains that they were recorded Bhumidars and co-tenure

holders (it is an admitted fact that Bhagirati and Ors. deposited ten times the land revenue under Sections 134 to 137 of the UP ZA and LR Act for grant of Bhumidari Sanad in respect of the suit land) and that no step was taken by the respondents ever to challenge their title to the suit property or the inclusion of their names in the revenue record. For this reason, the interest of the present appellants cannot be defeated particularly when they had made due enquiries u/s 55(1)(b) of the Transfer of Property Act that the vendors were the recorded Bhumidars of the suit property and had a transferable right before purchasing the suit property and therefore, in our opinion, they were bonafide purchasers for value without notice.

28. In *Lala Hem Chand v. Lala Pearey Lal and others*, AIR 1942 PC 64, it has been held that where a trustee has been in possession for upwards of 12 years, of property under a trust which is void under the law? Trustee acquires good title by 12 years possession. It follows that even assuming for the sake of argument, the sale-deed in favour of the contesting respondents is void, their possession having been found for a period of more than 12 years, they have acquired title by adverse possession.

29. The consolidation courts have been created to provide a forum to correct the revenue record and decide the related disputes. The courts have not been created with a view to give fresh chance of litigation to agitate stale or otherwise buried disputes which have been faded out with the passage of time. Revival of such disputes which have been set at rest due to inaction, estoppel or acquiescence, is not the purpose and object of the aforesaid Act. A party who could not lay the claim under the revenue court or civil court in view of the bar created by Limitation Act, would not be entitled to raise such disputes before consolidation courts. Experience shows that the Act is being used for arm twisting purposes more often than not. It has now out lived its purpose. It is more oppressive to marginal or small farmers and windfall to big farmers, land grabbers and unscrupulous litigants. Time has come to relook at the Act with the angle of desirability of its continuance in such villages where one round of consolidation is an accomplished fact, in particular.

30. No other point was pressed.

31. There is no merit in the present writ petition. It is devoid of any substance and is therefore, dismissed with costs.